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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1144

TEXAS INDUSTRIES, INC.,

Petitioner

vs.

RADCLIFF MATERIALS, INC., JIMCO, INC., and OKC DREDGING, INC.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANDO B. CELLINI
LEMLE, KELLEHER, KOHLMEYER & MATTHEWS
1800 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone (504) 586-1241
Counsel for Respondent Radcliff Materials, Inc.

JAMES A. BABST
CHAFFE, McCALL, PHILLIPS, TOLER & SARPY
1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone (504) 568-1320
Counsel for Respondent Jimco, Inc.

EWELL P. WALTHER, JR.
STEPHEN H. KUPPERMAN
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone (504) 581-3200
Counsel for Respondent OKC Dredging, Inc.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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Respondents herein respectfully request this Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 26, 1979.

MAY IT PLEASE THE COURT:

Petitioner Texas Industries, Inc. correctly asserts that there is but a single question presented by the instant petition for a writ of certiorari: "Whether a defendant in a Federal antitrust case may seek contribution." Petitioner's brief, page 2. Respondents Radcliff Materials, Inc., Jimco, Inc. and OKC Dredging, Inc. respectfully submit that the statement of the question itself demonstrates the inappropriateness of its review by this Honorable Court. *This very question* is presently being debated on the floor of Congress. Dedication of a portion of this Court's strained resources to consideration of an issue which is at the same time being squarely addressed by Congress would not only be patently wasteful, but would also be contrary to a tradition of deference which the judicial branch has accorded the legislative branch of government on this issue.

Legislation creating a cause of action for contribution in antitrust cases was introduced in Congress in May of 1979. A favorable report on this legislation was rendered by the Judiciary Committee of the United States Senate in November of 1979. [1] The issue of whether such a cause of action should be created, and the issue of what its scope should be if it were created, are now being considered on the floor of Congress. That is where consideration of these issues belongs, as the courts which have dealt with them have repeatedly observed.

The decision of the Fifth Circuit Court of Appeals in the instant case is illustrative. Judge Thornberry's opinion begins

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1. Report of the Committee on the Judiciary, United States Senate, on S. 1468, together with Supplemental Views, S. Rep. No. 96-428, 96 Cong., 1st Sess. (1979).

by noting that an unbroken line of federal cases had held there is no right of contribution among alleged antitrust coconspirators. [2] Then in February of 1979, a divided Eighth Circuit panel held for the first time that an antitrust defendant could, under certain circumstances, be entitled to contribution from a coconspirator not sued in the main demand. *Professional Beauty Supply v. National Beauty Supply*, 594 F.2d 1179 (8th Cir. 1979) [hereinafter *Professional Beauty*]. The Fifth Circuit rejected the arguments advanced by the majority in *Professional Beauty*, and concluded that any new rule should be the product of legislative action rather than judicial action:

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2. Respondents are aware of the following cases that have so held: *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, No. 75-2820 (E.D. La. 1977), *aff'd*, 604 F.2d 897, *en banc rehng. denied*, 608 F.2d 524 (5th Cir. 1979); *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1977-2 Trade Cas. ¶61,698 (D. Utah), *aff'd*, 1979-2 Trade Cas. ¶62,995, *en banc rehng. granted* (10th Cir. 1979); *In re Beef Industry Antitrust Litigation*, M.D.L. No. 248 (N.D. Tex. 1978), *aff'd*, 607 F.2d 167, *en banc rehng. denied* (5th Cir. 1979); *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. ¶62,689 (S.D. Tex.), *aff'd per curiam*, 606 F.2d 319 (5th Cir. 1979); *In re Fine Paper Antitrust Litigation*, M.D.L. No. 323 (E.D. Pa. 1979); *Alabama v. Blue Bird Body Co.*, No. 75-23-N (M.D. Ala.), *appeal docketed*, No. 79-2667 (5th Cir. 1979); *Hedges Enterprises v. Continental Group, Inc.*, 1979-1 Trade Cas. ¶62,717 (E.D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647 (D.D.C. 1979); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cas. ¶61,533 (N.D. Cal. 1976); *Labbee v. Wm. Wrigley & Co.*, No. 4029 (W.D. Wash. 1974); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

> "Our decision in this case is certainly subject to reasonable contrary arguments. In this area of interstitial lawmaking, however, to forge a new rule with questionable benefits and such possible detriments is a bad practice. Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved. In the absence of more compelling arguments in favor of contribution, this court is reluctant to create such a right as a matter of federal common law."
>
> 604 F.2d at 906.

The wisdom of the Fifth Circuit's approach is apparent from the different views expressed on just one of the many policy questions raised by the contribution issue: does the rule barring contribution increase the deterrent effect of the anti-trust laws, or decrease it? The Fifth Circuit accepted prevailing economic theory to the effect that "business managers, particularly in larger organizations, are generally 'risk averse' - - that is, they are deterred more by the slight prospect of a large loss than by the strong prospect of a small loss," and concluded the possibility of sole liability has an enhanced deterrent effect. 604 F.2d at 901. The majority opinion in the Eighth Circuit's *Professional Beauty* decision took the opposite view:

> "We believe that the question of deterrence actually cuts both ways and on balance a rule allowing contribution is actually a greater deterrent."
>
> 594 F.2d at 1185.

And Judge Hanson's dissenting opinion in *Professional Beauty* took the middle course:

> "To me the arguments on either side of the deterrence question are inconclusive and as a result I find deterrence of potential violators insufficient as a basis on which to predicate a new rule permitting contribution."
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> 594 F.2d at 1189.

The broad spectrum of opinion on that question alone, and the conflicting economic arguments that can be advanced in aid of virtually every shading in the spectrum, support the Fifth Circuit's refusal to alter the rule barring contribution in the absence of legislative action.

The most recent appellate pronouncement on the contribution issue emanated from the Tenth Circuit in *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶62,995, *en banc rehearing granted* (10th Cir. 1979) [hereinafter *Olson*], and it followed the Fifth Circuit's lead in deferring to Congress. *Olson* was decided in November of 1979, at a time when its panel had the benefit of both the Fifth Circuit and the Eighth Circuit opinions on contribution, and was also aware of the introduction of legislation in Congress on this issue. 1979-2 Trade Cas. at 79,703, fn. 13. The Court in *Olson* held that Congress, and not the judiciary, is the appropriate forum for debating the merits of contribution:

> "Before entering such a complex policy thicket, but recognizing a possible exception in the case of an unintentional violator, we believe this court should await a clear signal, at least, from the legislative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and

> more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation."
>
> 1979-2 Trade Cas. at 79,704 (footnote omitted).

Whether even the panel in *Professional Beauty* - - the only antitrust case that has ever permitted any form of contribution - - would have chosen to enter this "complex policy thicket," had it known what the Tenth Circuit knew when it decided *Olson,* is problematic. *Professional Beauty* was decided in February of 1979, and legislation on contribution was not introduced in Congress until May of that year. The majority opinion in *Professional Beauty* observed that the contribution issue had arisen "infrequently" in the case law, and was therefore "unlikely to spur immediate congressional action." 594 F.2d at 1184.

Petitioner in this case relies heavily on *Professional Beauty,* contending that it creates a split in the circuits which this Court must resolve. But petitioner neglects to point out that, even putting aside the special context in which *Professional Beauty* arose, [3] there has been a critical change in circum-

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3. The claim in *Professional Beauty* grew out of a situation very different from that presented by the instant case. *Professional Beauty* involved an attempted monopolization claim under §2 of the Sherman Act, asserted by a terminated distributor of beauty supplies against another distributor of beauty supplies. The plaintiff, Professional Beauty Supply, Inc., alleged that the defendant, National Beauty Supply, Inc., induced La Maur Inc., the supplier of both distributors, to

(footnote 3 continued on following page)

stances since the rendering of that decision. The Court in

(footnote 3 continued)
terminate Professional as a La Maur distributor. Professional did not name La Maur as a defendant. Thereafter, National filed a third party complaint against La Maur, claiming that it had no control over La Maur's decision to terminate Professional, and that Professional had been persuaded not to name La Maur as a defendant because of La Maur's decision to renew Professional's franchise. The Eighth Circuit expressed concern over the possibility that "a large or powerful tortfeasor" may have "sufficient economic influence to prevent a plaintiff from including it as a defendant", and remanded the case for "further factual development" of National's allegations. The court stated that:

> "We do not hold that contribution is available to all violators of the antitrust laws, regardless of the flagrancy of the conduct of the party seeking contribution. The decision of whether a particular party is entitled to contribution is best left to the trier of fact upon consideration of all of the circumstances of a case . . . . At this stage of the proceedings contribution in favor of National is a possibility."
>
> 594 F.2d at 1186.

By contrast, the instant case involves no assertion of economic coercion or collusion. Plaintiff Wilson P. Abraham Construction Corporation sued defendant Texas Industries, Inc. for allegedly participating in a conspiracy to fix prices on concrete. Abraham did not sue the others claimed to be involved in this conspiracy because it had only purchased concrete from Texas Industries. Thus if Abraham paid any illegal overcharges on concrete, then all such overcharges would have been received by Texas Industries. In an attempt to cut its losses in the event of a recovery by Abraham, Texas Industries filed a third party complaint seeking contribution from respondents herein.

Professional Beauty assumed congressional action on contribution was unlikely. Now, one year later, contribution legislation is presently pending in the Senate. Mr. Justice Harlan observed more than twenty years ago that:

> " . . . [A] conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court." [4]

Where, as here, congressional action is underway with respect to the very subject which petitioner claims presents a conflict among the circuits, it is manifest that the claimed conflict, even if it exists, is not dependent upon this Court alone for its resolution. Indeed, any contribution decision handed down by this Court under these circumstances could well be impaired or even rendered nugatory by legislation.

Burgeoning caseloads at all levels of the federal judiciary have led to a substantial increase in the number of applications for writs of certiorari. As the number of applications has grown, there has been a corresponding decrease in the percentage of cases in which this Court can grant certiorari:

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4. Mr. Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Australian L. J. 108 (1959), *cited in* R. STERN AND E. GRESSMAN, SUPREME COURT PRACTICE 266 (5th ed. 1978).

> "Whereas the percentage of grants was often said in the past to be in the 10 to 15 percent range, the overall percentage of grants (including the summary dispositions) has now declined to around 6 percent." [5]

Statistics compiled by the Clerk of Court for the Supreme Court's most recent term ended October 1, 1979 show a total of 3,945 certiorari petitions filed during the term. Of that total, 3,672 were denied, 110 were decided summarily, and only 163 were granted and set for oral argument.

Respondents respectfully suggest that it would be inexpedient to place the instant case among the very select number of cases in which certiorari is granted, when it is likely that pending legislation could turn any disquisition by this Court on the contribution issue into an academic exercise.

CONCLUSION

The Fifth Circuit correctly concluded in the instant case that the decision to create a new cause of action for contribution in antitrust cases should be left to Congress, "a forum better suited to evaluation of the competing interests and policies involved." 604 F.2d at 906. Congress is now debating this very question. Deference to the work of Congress, and recognition of the impact this work is likely to have on any Court decision on contribution, militate strongly against the issuance of a writ of certiorari in this case. Respondents there-

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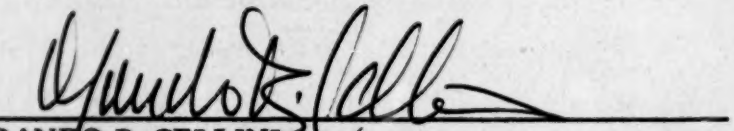
5. R. STERN AND E. GRESSMAN, SUPREME COURT PRACTICE 260 (5th ed. 1978).

fore urge the Court to deny the petition filed herein forthwith.

Respectfully submitted,



DANDO B. CELLINI
LEMLE, KELLEHER, KOHLMEYER & MATTHEWS
1800 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone (504) 586-1241
Counsel for Respondent Radcliff Materials, Inc.

JAMES A. BABST
CHAFFE, McCALL, PHILLIPS, TOLER & SARPY
1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone (504) 568-1320
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EWELL P. WALTHER, JR.
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STONE, PIGMAN, WALTHER, WITTMANN
& HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone (504) 581-3200
Counsel for Respondent OKC Dredging, Inc.

Dated February 21, 1980

CERTIFICATE OF SERVICE

Undersigned counsel of record for Respondent Radcliff Materials, Inc. hereby certifies that, on February 21, 1980, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon all counsel of record in this case, by hand delivery or by mail, in compliance with the provisions of Rules 33.1 and 33.3(b) of the Rules of Practice of the Supreme Court of the United States.

DANDO B. CELLINI